STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL BRODMAN AND KAREN GRIMM	:	DETERMINATION DTA NO. 818594
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1996.	:	

Petitioners, Michael Brodman and Karen Grimm, 60 East 96th Street, Apt 11A, New York, New York 10028, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1996.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, State Office Building, Veteran's Memorial Highway, Hauppauge, New York on February 8, 2002 at 10:30 A.M., with all briefs to be submitted by May 17, 2002, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Barry Liebowicz, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUE

Whether the Division of Taxation correctly held petitioners subject to New York City personal income tax as resident individuals pursuant New York City Administrative Code § 11-1705(b)(1)(B) for the year 1996.

FINDINGS OF FACT

1. Petitioners, Michael Brodman and Karen Grimm, filed a New York State Resident Income Tax Return (Form IT-201) and a City of New York Nonresident Earnings Tax Return (Form NYC-203) for the year 1996.

2. On January 8, 1999, the Division of Taxation ("Division") issued to petitioners a Statement of Personal Income Tax Audit Changes ("Statement") proposing additional personal income tax due for the year 1996 on the assertion that petitioners were taxable as residents of the City of New York for such years.

3. The foregoing Statement was issued as the result of audit activities undertaken by the Division concerning the years 1993 and 1994. Petitioners, in turn, settled the audit with regard to 1993 and 1994 by including the years 1995 and 1996. More specifically, the Division accepted petitioner's returns as filed for 1993 and 1995, while petitioners consented to being subject to tax as New York City statutory residents for the years 1994 and 1996. In connection with this agreement, petitioners executed the Statement and paid the tax asserted as due thereon for the year 1996.[1]

4. On August 9, 1999, petitioners filed a Claim for Credit or Refund of Tax Due (Form IT-113X) for the year 1996, seeking a refund of tax plus interest paid thereon in the aggregate amount of $45,968.64 for such year. The basis for petitioners' refund claim, as set forth on this form, was as follows:

> As a result of audit a tax was assessed against the taxpayers upon a determination that they were statutory New York City Residents. They were not New York City Residents in fact or law for such period and they seek hereby a refund of the tax paid on the erroneous assessment.

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[1] The Statement shows the amount of additional tax due for 1996, calculated upon the assertion that petitioners were subject to tax as residents of New York City, to be $39,957.44, excluding interest.

5. On January 26, 2000, the Division issued a Notice of Disallowance denying petitioners' claim for refund for 1996, stating:

> [i]t is Audit's position that it was not the intent of the 11 month rule to be applied in situations where the taxpayer has control of who he lets use his or her permanent place of abode. Rather, it was intended to apply to those situations where the Taxpayer either moves in or out of New York.

6. Petitioners challenged the Notice of Deficiency by requesting a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A conciliation conference was held on March 23, 2001, and by a subsequent Conciliation Order (CMS No. 179929) dated May 4, 2001, the Notice of Disallowance was sustained in full. Petitioners continued their challenge by filing a petition with the Division of Tax Appeals.

7. In March 1993, petitioners purchased a first floor cooperative apartment located at 1000 Park Avenue, New York, New York, consisting of one bedroom, a living room, one bathroom and a small galley kitchen. At the time of the purchase, petitioners were married to each other. In 1996, petitioners separated. Petitioner Karen Grimm remained in the couple's original marital residence in Great Neck, New York, while petitioner Michael Brodman moved into an apartment also located in Great Neck, New York. Both petitioners continued in this separate living situation throughout 1996.

8. During 1996, while going through the process of a divorce, petitioners determined that the Park Avenue apartment would be sold. The apartment was put on the market in late September or early October 1996. At this time, a real estate broker was brought to the apartment to inspect and evaluate the premises. Thereafter, neither of the petitioners physically returned to the premises.

9. Petitioner Michael Brodman's cousin, Ira Hirschbach, a New Jersey resident, had sold his home in Leonia, New Jersey in November 1996 and was, at that time, in the process of

having a new home constructed in New Jersey. The construction would take more than a year to complete and Mr. Hirschbach and his family needed a place to live. Petitioners offered Mr. Hirschbach and his family the use and occupancy of their furnished Park Avenue apartment commencing on November 1, 1996. Mr. Hirschbach accepted this offer, and in return agreed to reimburse petitioners for the direct operating expenses and costs of the apartment, including mortgage and maintenance fees, utilities, and the like. The Hirschbachs received the keys to the apartment and full access to and occupancy of the premises in November 1996. They resided there from November 1, 1996 until December 15, 1996, at which time they moved to another temporary residence.

10. During the period of the Hirschbach's occupancy of the apartment, neither of the petitioners visited or otherwise used the premises. There was allegedly only one set of keys to the apartment, which were given to and remained with the Hirschbachs until they vacated the premises on December 15, 1996, after which the keys were returned to petitioners.

11. The Hirschbachs initially arranged for phone calls made to their prior New Jersey residence to be forwarded to the Park Avenue apartment, and they charged outgoing calls from the apartment to their New Jersey number. This proved to be uneconomical, and the Hirschbachs eventually determined to use petitioners' phone at the apartment and reimburse petitioners for the costs associated therewith.

12. Petitioners ultimately sold the Park Avenue apartment, pursuant to a contract entered into in early 1997 which closed in or about July of 1997. The apartment was sold including the furnishings therein.

SUMMARY OF THE PARTIES' POSITIONS

13. The Division makes no claim that petitioners were domiciled in New York City or were subject to tax as residents pursuant to New York City Administrative Code § 11-1705(b)(1)(A). Rather, the Division's position is that petitioners were subject to tax as "statutory residents" of New York City because they maintained a permanent place of abode in the City (the 1000 Park Avenue apartment) and were present in the City on more than 183 days in 1996. Petitioners, for their part, have conceded that they were physically present in New York City on more than 183 days during 1996, and thus challenge the Division's refund disallowance on only one basis. Specifically, petitioners claim that they did not maintain a permanent place of abode in New York City for substantially all of 1996, and hence did not meet one of the two statutory requirements necessary for individuals to be subject to tax as residents of New York City under New York City Administrative Code § 11-1705(b)(1)(B).

CONCLUSIONS OF LAW

A. The New York City Administrative Code § 11-1705(b)(1)(A) and (B), sets forth the definition of a New York City resident individual for income tax purposes as follows:

> Resident individual. A resident individual means an individual:
>
> (A) who is domiciled in this city, unless (1) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city . . ., or
>
> (B) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States.

The definition of a New York City "resident" is identical to the definition of a New York State resident, except for the substitution of the term "city" for "state." (***Compare*** Tax Law § 605[b][1][A],[B].) The classification of resident versus nonresident is significant, since

nonresidents are taxed only on their New York City or State (as relevant) source income, whereas residents are taxed on their income from all sources.

B. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York City. The first, or domicile basis, is not at issue in this proceeding. The second, or "statutory" resident basis, requires dual predicates for resident tax status, to wit, (1) the maintenance of a permanent place of abode in the City and (2) physical presence in the City on more than 183 days during a given taxable year. Since petitioners have conceded that they were physically present in the City on more than 183 days in 1996, the issue devolves to whether petitioners maintained a permanent place of abode in the City in 1996. The specific question presented is whether the 1000 Park Avenue apartment was a permanent place of abode maintained by petitioners for 1996.

C. Regulations of the Commissioner of Taxation and Finance[2] provide, at 20 NYCRR 105.20(a)(2), that the term "resident individual" includes:

> [a]ny individual (other than an individual in active service in the Armed Forces of the United States) who is not domiciled in New York State, but who maintains a permanent place of abode *for substantially all of the taxable year* (generally, the entire taxable year disregarding small portions of such year) in New York State and spends in the aggregate more than 183 days of the taxable year in New York State. (Emphasis added.)

In addressing the issue of what constitutes a permanent place of abode, 20 NYCRR 105.20(e)(1) goes on to provide as follows:

> [a] permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacation, is

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[2] 20 NYCRR 295.3(a) directs that the issue of whether an individual is a resident of the City of New York shall be determined using the same rules and definitions that apply in determining whether an individual is a resident of the State of New York.

> not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode.

D. Clearly, the apartment at 1000 Park Avenue was a permanent place of abode, as described in the foregoing cited regulation. The more particular question, however, is whether the apartment constituted a permanent place of abode maintained by petitioners for substantially all of the year in question.

E. In ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 340, 606 NYS2d 404), the Tribunal was asked to decide the meaning of the phrase "maintains a permanent place of abode." The Tribunal noted that the term "maintain" is not defined in the pertinent statute or regulation and, accordingly, examined the legislative history of the statutory language, concluding:

> Given the various meanings of the word 'maintain' and the lack of any definitional specificity on the part of the Legislature, we presume that the Legislature intended, with this principle in mind, to use the word in a practical way that did not limit its meaning to a particular usage so that the provision might apply to the 'variety of circumstances' inherent to this subject matter. In our view, one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place. This would include making contributions to the household, in money or otherwise. (***Matter of Evans, supra***).

A few years before its decision in ***Evans***, the Tribunal, in applying the phrase "permanently maintained" stated: "The operative words of the regulation are 'permanently maintained' which the petitioner does through his continued ownership of the house . . ." (***Matter of Feldman***, Tax Appeals Tribunal, December 15, 1988).

F. The record is clear and it is undisputed that petitioners maintained the Park Avenue apartment for the first ten months of 1996. Thereafter, they allowed occupancy and use of the premises by the Hirschbach family, apparently in a gesture of familial generosity. While deriving

no net cash rental "profit" from this arrangement, petitioners nonetheless derived the benefit of the Hirschbachs' undertaking payment of the ongoing costs and expenses of the apartment. Petitioners take the position that they did not have access to the apartment for the duration of the Hirschbachs' occupancy. However, absent any explicit agreement limiting petitioners' access, this arrangement reflects essentially a concession in the nature of respect or normal understanding and courtesy, rather than any legal impediment under which petitioners' access to the premises was precluded. Petitioners at all times retained control over the property, including control over who, such as the Hirschbach family, used the property. Further, the Hirschbachs' use and occupancy of the premises was for a short period of approximately six weeks. Although the apartment remained vacant and unused from the Hirschbachs' departure on December 15, 1996 through the balance of 1996, and was being offered for sale, there was no apparent impediment to petitioners' use or occupancy of the premises during such period, and their nonuse was simply a matter of choice.

While petitioners accepted the impediment of limited access (or the decision not to have access) as the result of personal choice and generosity to a family member for a short six-week period during 1996, it remains that petitioners never relinquished their full control over who used the premises for the entire year 1996. Petitioners had unfettered access to the premises for at least 46 out of 52 weeks (or 10½ out of 12 months) of the year 1996. Webster's Third New International Dictionary defines "substantial" to mean, *inter alia*, "[b]eing that specified to a large degree or in the main." Ten and one-half months out of twelve months is "to a large degree" and clearly constitutes "substantially all of the taxable year" per 20 NYCRR 105.20(a)(2). It follows, thus, that petitioners maintained a permanent place of abode in New York City for substantially

all of the year 1996. Accordingly, petitioners were properly held subject to tax as residents of New York City for 1996 and the Division properly denied their claim for refund.

G. Petitioners have seized upon the so-called "11 month rule" as referenced in the Division's Notice of Disallowance. Petitioners argue that the statute (Administrative Code § 11-1705[b][1][B]) requires maintenance of the permanent place of abode for "substantially all of the taxable year," and go on to assert that "substantially" has been statutorily defined to mean 11 months. Contrary to petitioner's position, it is in the implementing regulations (20 NYCRR 105.20[a][2]) and not in the statute (Administrative Code § 11-1705[b][1][B]) that the phrase "substantially all of the taxable year" is found. Moreover, neither the relevant statute nor the implementing regulations define "substantially" to mean 11 months, or set forth an "11 month rule." Rather, the source of such 11-month reference is apparently found in the Division's Nonresident Audit Guidelines, at section 5, which states in part with respect to "Statutory Resident" as follows:

> that for this [Statutory Resident] purpose, the phrase "substantially all of the taxable year" means a period exceeding 11 months. For example, an individual who *acquires* a permanent place of abode on March 15th of the taxable year and spends 184 days in New York State would not be a statutory resident since the permanent place of abode was not maintained for substantially the entire year. Similarly, if an individual maintains a permanent place of abode at the beginning of the year but *disposes* of it on October 30th of the tax year, s/he too, would not be a statutory resident despite spending over 183 days in New York. *Audit Division policy considers the "substantial part of a year" to be a general rule rather than an absolute rule*. For example, suppose a couple rents an apartment in New York year after year, but each year they sublet the apartment to their son for the month of December. Under the absolute rule, this couple would not be maintaining a permanent place of abode in New York since they do not maintain it for more than 11 months of any particular year. However, the Division's position is that this couple should properly be covered by the 183 day rule since they are maintaining the abode on a regular basis. (Emphasis added.)

H. The foregoing audit guideline, reproduced in the Division's post hearing brief, is simply that, a guideline for the Division's auditors, rather than a law or a regulation. It is certainly not binding or dispositive in this forum. More to the point such guideline, by its own terms, clearly does not apply to the situation at hand. First, petitioners neither *acquired* nor *disposed* of the subject premises during the year in issue. Moreover, petitioners never relinquished control over who used the premises at any point in time. They simply chose to allow a relative of petitioner Michael Brodman to use the premises for a short period of time. As noted, petitioners' choice not to access the premises during this time was more in the nature of self-imposed civility or hospitality versus any legal impediment to access. The guideline itself proclaims the Division's audit position to be that the "substantial part of a year" standard set forth in 20 NYCRR 105.20(a)(2) is "a general rule rather than an absolute rule." This is entirely consistent with the nature of the term "substantial," as defined in general and as appearing in the regulation. Finally, to the extent that the audit guideline may be said to be instructive, the situation at hand is closer to the latter portion of the guideline and its example of subletting an apartment for the short period of a month, under which scenario the sublessors are considered maintaining the abode on a regular basis and are subject to tax as residents.[3] In sum, the so-called 11-month rule is neither binding on this forum nor is it particularly applicable to the situation at hand, and petitioner's reliance thereon is misplaced.

I. Finally, petitioners have asserted that since they were in the process of divorcing, and had placed the property on the market for sale, the property ceased being a place of abode and

[3] Defining "substantially" by the implementation of an absolute "11 month rule" in every instance, as petitioners urge, would allow the statutory resident provisions of the Administrative Code and the implementing regulations to be easily circumvented by the simple expedient of giving exclusive use of one's place of abode to another person for a period in excess of one month for any reason (e.g., while on vacation).

had changed its character to investment property. Petitioners go on to assert that the "rental" of the premises to the Hirschbachs was simply a way to defray the costs of holding an investment property pending its sale. This position is rejected. First, the record contains no brokerage agreement for the listing of the property nor any of the other details concerning the listing of the property for sale. There is no evidence that petitioners' initial purchase or ongoing holding of the apartment was for investment purposes. Rather, petitioner Michael Brodman's testimony was that the residential cooperative apartment was simply purchased as a place for petitioners to go to and use. In the same manner, allowing the Hirschbachs to use the property on a reimbursement basis obviously relieved petitioners of the financial costs of carrying the apartment, at least for the very short period of one and one-half months. However, the tenor of the testimony reflects that allowing such use was more in the nature of a gesture of familial generosity by petitioners as opposed to something offered or undertaken with any thought or purpose of defraying the costs associated with the apartment. Moreover, it would appear that petitioner resumed the direct burden of the financial costs of the apartment after the Hirschbachs' departure and did not attempt to "rent" the apartment so as to reduce the carrying costs. As noted, while petitioners may not have accessed or used the apartment at any point after the Hirschbachs' occupancy commenced, the same was as the result of choice rather than of legal impediment, and at no point in time did petitioners relinquish their control over who used their apartment. Thus, it cannot be concluded that petitioners at any point terminated their access to or control over their permanent place of abode in the City in 1996 or, to the extent relevant (if at all), that the character of the property changed from residential to investment property.

J. The petition of Michael Brodman and Karen Grimm is hereby denied and the Division's Notice of Disallowance dated January 26, 2000 is sustained.

DATED: Troy, New York
November 7, 2002

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE